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No. 78-125

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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DENNIS L. ROBERTS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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WADE H. MCCREE, JR.,
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## OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on June 27, 1978. The petition for a writ of certiorari was filed on July 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioner was prejudiced by newspaper accounts of his trial.

2. Whether the district court erred in refusing to dismiss a juror who knew one of the government's witnesses.

3. Whether petitioner's sentence was proper under the mail fraud statute (18 U.S.C. 1341).

## STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Northern District of Illinois on 50 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to separate fines of $1,000 on each count. In addition he was sentenced to concurrent terms of five years' imprisonment on counts one through forty-eight; a consecutive term of three years' imprisonment on count forty-nine; and five years' probation on count fifty, on condition that he make restitution. The court of appeals affirmed and, at the suggestion of the government, remanded the sentence on count fifty for clarification of the terms of restitution (Pet. App. 3).

Petitioner acknowledges that the evidence was sufficient to sustain the conviction (Pet. 21). Briefly, it showed that petitioner advertised digital wristwatches for sale in *TV Guide* magazine and received by mail approximately $1,700,000 in prepaid orders from thousands of customers. Petitioner never sent any watches to these customers, and never had any intention of doing so (Tr. 75-94, 129-159, 535, 203-210, 352-361, 837-839, 226-228).

## ARGUMENT

1. Petitioner contends (Pet. 2, 7-9) that his conviction should be reversed because there was an "abundance" of newspaper publicity and "inadequate inquiry" into its possible prejudicial effect. But unlike *Marshall* v. *United States*, 360 U.S. 310, where jurors read newspaper accounts of the defendant's previous felony record, there is no indication here that any juror read or heard anything that would have been inadmissible as evidence. On the contrary, the district court questioned the jurors



about several newspaper articles and a radio broadcast pertaining to the trial. As petitioner acknowledges (Pet. 4), each of the jurors told the court he could be fair notwithstanding anything he had read or heard (Tr. 264-275). Several of the jurors stated that they had made a deliberate decision not to read the articles. The jurors also promised not to read or listen to any coverage of the case (Tr. 274). Thus, petitioner has made no colorable showing of any prejudice whatever. See *Irvin* v. *Dowd*, 366 U.S. 717.

2. Petitioner contends (Pet. 8-12) that he was prejudiced by the district court's refusal to dismiss a juror who was acquainted with one of the government's witnesses. The full record refutes this claim. During the trial, the court received a note from Ms. O'Brien, one of the jurors, indicating that she knew Mr. Pierchala, one of the government's witnesses. The judge questioned Ms. O'Brien in chambers (Tr. 583-584).

> Q. And let me ask you this question: Do you feel that because of your friendship with Mr. Pierchala that that would affect your ability to sit as a juror in this case?
>
> A. No. I will weigh the evidence as I hear it and as I feel it. I just want everyone to know that because of our friendship I might tend to believe more than perhaps another juror, because of my past experience with him, but there would be no other weight attached to that.
>
> Q. But you feel that you can still keep an open mind as to all the evidence in the case and wait until you have heard all the evidence?
>
> A. Yes.

The judge later continued in open court (Tr. 589-590):

Q. As I understand your answer, you stated that because of your friendship with Mr. Pierchala you might tend to give his testimony more credibility than another juror would give, is that right?

A. It could possibly be.

Q. It could possibly be?

A. I don't know, I don't really know.

Q. You don't really know? Do you feel now—I think I asked you before in Chambers, and I have repeated your answers to counsel here—that you can keep, number one, insofar as the evidence is concerned, an open mind until you have heard all of the evidence in the case?

A. Yes, I do.

Q. And that you would, at the conclusion of the case, follow the law as I give it to you, including how a juror is to judge the credibility of witnesses.

A. Upon your instruction?

Q. Yes.

A. Yes, I would follow that.

Q. You would follow my instructions?

A. Yes.

Petitioner's counsel then questioned Ms. O'Brien (Tr. 590-593):

[COUNSEL]: [Do you] respect [Mr. Pierchala's] judgment?



[MS. O'BRIEN]: Insofar as my dealings with him, yes.

[COUNSEL]: All right, you think that you would respect his judgment perhaps more than some other witness whom you haven't even heard yet, because of your relationship with him outside of this courtroom?

[MS. O'BRIEN]: I don't believe I heard judgments, I believe I heard evidence.

[COUNSEL]: Would you tend to give his testimony more credibility than that of some other witness who might testify in some way inconsistent with his testimony, because of matters that your friendship and matters that have occurred outside the courtroom? That is really the question. It is not an easy question, is it?

[MS. O'BRIEN]: It isn't easy.

[COUNSEL]: No.

[MS. O'BRIEN]: I see this man approximately twice a year. A couple of years ago we worked very hard on a project, but as far as a continual friendship on a continuing basis, I guess you would say it would not be, and I know nothing about his business. I just know him as a person and I can't say

whether inadvertently, because of my feelings, I might believe him more than another witness, perhaps. I would have [to] weigh it all.

[COUNSEL]: Thank you. I have nothing further.

[THE COURT]: In other words, Mrs. O'Brien, you say, on your oath, that you would weigh all the testimony?

[MS. O'BRIEN]: I would weigh all the testimony.

[THE COURT]: And you wouldn't let that acquintanceship and that work that you had with this witness affect your judgment?

[MS. O'BRIEN]: No.

The court had ample opportunity to observe the juror's demeanor and to listen to her answers. Petitioner's counsel had full opportunity to question the juror but failed to raise the contention of bias from "the realm of speculation to the realm of fact." *Dennis* v. *United States*, 339 U.S. 162, 168. Petitioner recognizes (Pet. 11) that he has the burden of showing bias. He has not done so. While it would perhaps have been the safer course to substitute an alternate juror, the trial court did not abuse its discretion under all the circumstances in refusing to remove the juror, and the issue does not merit further review by this Court.

3. Finally, petitioner contends (Pet. 13-21) that the district court erred in sentencing him on each count for a continuing scheme under the mail fraud statute, 18 U.S.C. 1341. Excluding probation and restitution,



petitioner was sentenced to eight years in prison and fined $50,000, but he urges that the maximum sentence he could be given was five years and $1,000. This contention is frivolous. It has long been settled that each use of the mails constitutes a separate offense under 18 U.S.C. 1341. *Badders* v. *United States*, 240 U.S. 391. There is no reason now for the Court to accept petitioner's invitation (Pet. 14) to re-examine *Badders*.[1]

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1978.

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[1]Petitioner's reliance on *Simpson* v. *United States*, No. 76-5761, decided February 28, 1978, and *Jeffers* v. *United States*, 432 U.S. 137, is misplaced. In *Simpson* and *Jeffers* this Court disallowed cumulative punishment for a single transaction that violated more than one criminal statute. The instant case does not involve a single transaction but repeated violations of the mail fraud statute.

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